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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1385

REGINOLD HUTCHERSON, et al.,
Appellants,

vs.

LAURIE LEHTIN, et al.,
Respondents.

On Appeal from the United States District Court
for the Northern District of California

Jurisdictional Statement

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OCTOBER TERM, 1969

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On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

Appellants appeal from the order of the three-judge United States District Court for the Northern District of California, entered on January 5, 1970, denying appellants' motion for a preliminary injunction and granting summary judgment to appellees. They further appeal from the final judgment by the same court entered on March 12, 1970, granting final judgment to the appellees.

Opinion Below

The opinion of the District Court for the Northern District of California and the final judgment of the court are attached hereto as Appendix A.

Jurisdiction

This suit was brought under Title 42 U.S.C. §1983. A three-judge District Court was convened pursuant to Title 28 U.S.C. §2281. The order of the District Court denying appellants' motion for a preliminary injunction and grant-

ing summary judgment to appellees was entered on January 5, 1970. Appellants filed a Notice of Appeal from that order on February 3, 1970. The final judgment of the District Court granting judgment to the appellees was entered on March 12, 1970. Appellants filed a Notice of Appeal from that judgment on March 13, 1970. The jurisdiction of the Supreme Court to review these decisions of the District Court is conferred by Title 28 U.S.C. §1253.

Questions Presented

1. Does the California unlawful detainer law (California Code of Civil Procedure, Sections 1159-1179 (a)) deprive appellants and other tenants similarly situated of their property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

2. Does the California unlawful detainer law deny appellants and other tenants similiarly situated the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution?

Statutes Involved

The California unlawful detainer law (California Code of Civil Procedure, § 1159-1179(a)) is directly at issue in this case and is set forth in full in Appendix B. The following statutes and regulations are also pertinent and are set forth in Appendix B:

California Code of Civil Procedure § 440;
California Civil Code § 1941, 1942;
California Health and Safety Code § 17995;
Title 8, *California Administrative Code* § 17925, 17926;

Michigan Comp. Laws § 600.5637;
McKinney's Cons. Laws of New York Ann. § 49.5-732, 49.5-743.

Statement

Appellants are residents of the City of Oakland, the County of Alameda and the State of California. This action was filed on September 9, 1969 on behalf of themselves and all tenants of substandard buildings in the State of California. The appellants, plaintiffs in the district court action, sought declaratory relief that the California unlawful detainer law (Calif. Code of Civil Procedure § 1159-1179(a))[1] is unconstitutional insofar as it prevents tenants of substandard dwellings from raising defenses and counterclaims arising out of the condition of their dwellings. The appellants further sought a preliminary and permanent injunction restraining the appellee landlord and the appellee sheriff from enforcing against them judgments previously obtained by the landlord in proceedings under the California unlawful detainer law in the Oakland-Piedmont Municipal Court.[2]

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1. Calif. Code of Civil Procedure is hereinafter abbreviated as "C.C.P."

2. On July 11, 1969, and on August 7, 1969, the landlord filed unlawful detainer proceedings against the appellants in the Oakland-Piedmont Municipal Court. On August 26, 1969, the presiding Judge of the Alameda County Superior Court, in a hearing on a Writ of Prohibition, ruled that as a matter of law the appellants' proposed defenses could not be asserted in an unlawful detainer proceeding. On August 26, 1969, the presiding Judge of the Oakland-Piedmont Municipal Court, without a hearing on appellants' defenses, entered judgment for the money sought in the complaints and judgment for eviction. The court rejected appellants offer to post a bond and denied them a stay of execution pending an appeal. Under the special appellate rules of the California unlawful detainer law no other California court could thereafter grant a stay pending an appeal. C.C.P. 1176; *Mendoza v. Small Claims Court of Los Angeles Judicial District*, 49 Cal.2d 668, 321 P.2d 9 (1958) (and cases cited therein).

On September 10, 1969, Judge William T. Sweigert, United States District Judge, issued an order restraining the eviction of the appellants. The appellants posted a bond to secure the appellees.

On October 3, 1969, a three-judge district court was convened to hear appellants' motion for a preliminary injunction. Oral argument was presented by each side, but no testimony or other evidence was received by the court.

On January 5, 1970, the court issued its Memorandum of Decision dissolving the restraining order, denying a preliminary injunction, and granting summary judgment to the appellees.[3]

On March 12, 1970, the court issued a final judgment declaring the California unlawful detainer law constitutional as against the contrary claims of appellants.

ARGUMENT

I. Appellants Have Been Deprived of a Fair and Proper Hearing Under the California Unlawful Detainer Law.

A. THE QUESTIONS ARE SUBSTANTIAL.

Appellants and other tenants of substandard buildings cannot obtain a hearing on issues vital to their defense in California unlawful detainer actions. The hearing provided to tenants is so summary, and the issues so restricted, as to be tantamount to no hearing at all. Despite the fact that they had valid defenses and counterclaims, the appellants were denied the right to defend themselves in the unlawful detainer proceedings initiated against them. The combined judgments in the proceedings brought against them exceeded $1,000 in money damages. The judgments ordered

3. The court initially abstained on the question of retaliatory eviction, but on February 18, 1970, it dismissed any claims pertaining to retaliatory eviction pursuant to Rule 41(b) Fed. R. Civ. P. Appellants are not appealing from this dismissal.

the eviction of the appellants from their homes. Despite offers to post a bond, the municipal court denied stays of execution. Subsequent to the dissolution of the restraining order in this case, the appellants have all been evicted. Two of the appellants have had a bank account garnished, and the others are under immediate threat of garnishment. At no point have they had a hearing on their defenses or counterclaims. Appellants contend on behalf of themselves and other tenants similarly situated that this summary procedure deprives them of their property without due process of law and denies them the equal protection of the laws.

The district court opinion recognizes that the appellants were precluded from raising affirmative defenses and counterclaims that are otherwise available as a matter of substantive law in California (Appendix A-4, 5, 10). The court also indicates that the summary procedure followed in those unlawful detainer cases was a correct application of the California unlawful detainer law (Appendix A-8). The District Court is clearly mistaken, however, in concluding that this California procedure does not violate the procedural due process requirement and constitute a denial of equal protection.

Appellants are not asking this Court or the district court to create any additional substantive rights for tenants. They contend, however, that the California unlawful detainer law denies them any effective remedy for the rights they possess. They contend that they have been deprived of their property without a fair or proper hearing.

B. THE QUESTIONS ARE IMPORTANT.

The deprivation of tenants' rights in unlawful detainer proceedings contributes directly to the perpetuation of slum housing. The plight of slum tenants does not require

extensive argument. It has been recognized as a critical problem both by Congress[4] and by a succession of prestigious governmental commission.[5] The correlation between substandard housing and poverty is extremely high.[6] The correlation between substandard housing, poverty and race is even more serious. As the Douglas Commission succinctly stated (*supra*, at 10):

> If you are *poor* and *non-white* and *rent*, the chances are three out of four that you live in substandard housing. (Emphasis in original.)

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4. *Housing and Urban Development Act of 1968*, Sec. 2:
The Congress affirms the national goal, as set forth in Section 2 of the Housing Act of 1949, of "a decent home and suitable living environment for every American family".
The Congress finds that this goal has not been fully realized for many of the nation's lower income families; that this is a matter of grave national concern; and that there exists in the public and private sectors of the economy the resources and capabilities necessary to the full realization of this goal. (Emphasis added.)

5. *Report of the President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society* (1967), 60-62; *Report of the National Advisory Committee on Civil Disorders* (1968) (The Kerner Commission), 467-482; *President's Committee on Urban Housing, A Decent Home* (1968) (The Kaiser Commission), 39-45; *National Commission on Urban Problems, Building the American City* (1969) (The Douglas Commission), 40-55; *National Commission on the Causes and Prevention of Violence, To Establish Justice, To Ensure Domestic Tranquility* (1970) (The Eisenhower Commission), 29-33.

6. *Douglas Commission, supra*, 76-78.
Appellants filed this action on behalf of themselves and "all tenants of substandard dwellings within the State of California." The District Court opinion appears to limit the class to tenants of substandard housing who are also persons of poverty or low-income. Therefore, as used in this jurisdictional statement, the terms "tenants of substandard housing" and "low-income tenants" are intended to refer to low-income tenants of substandard housing.

The low-income tenant is also faced with the fact that the demand for low-income housing far exceeds the supply and that the amount of rent he must pay constitutes a disproportionately large percentage of his income.[7]

In this context, the procedural rights of low-income tenants are extremely important. The tenant must seek redress of his grievances in the courts because there is no nonjudicial solution available.[8] However, the substantive rights of a litigant are rendered meaningless if he is denied basic procedural fairness. *Sniadach v. Family Finance Corp.*, 395 U.S. 337; *Armstrong v. Manzo*, 380 U.S. 545; *Speiser v. Randall*, 357 U.S. 513. Tenants of substandard housing face that very problem. They do not suffer from a lack of laws or public policy directed toward the elimination of slum housing. What they lack is an effective remedy.[9]

Procedural fairness in an unlawful detainer proceeding is essential to the protection of a low-income tenant's rights. The procedure under the California unlawful detainer law is swift.[10] If the tenant loses, he is immediately evicted and

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7. *Douglas Commission, supra*, 73-77

8. The low-income tenant cannot rely on the government or the private economy to solve his problem for him. Code enforcement is generally ineffective and often works against the tenant's real needs. *Douglas Commission, supra*, 273-307; Levi, *The Legal Needs of the Poor; Focal Leverage Points in Problems Relating to Real Property*, 66 Colum. L. Rev. 275 (1969). New construction of housing will not alleviate the problem, because new construction each year is almost one million short of the need. *Kaiser Commission, supra*, 40. There is no profit incentive for the landlord to repair a substandard building. The housing shortage plus accelerated income tax depreciation makes a slum building profitable despite its condition. *Douglas Commission, supra*, 399-407.

9. Levi, *supra*, 66 Colum. L. Rev. 275

10. The tenant receives a three-day notice, followed by a three-day summons, followed by preferential setting of the case on the trial calendar. C.C.P. §§1161, 1167, 1179a. Normally, there will be less than two weeks between the service of summons and entry of judgment. Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 Hastings L.J. 287, 293-297 (1970).

his wages, furniture and other assets are subject to execution. Because of the precarious economic position of the low-income tenant, the all too frequent result is to render the tenant and his family homeless and penniless. Society suffers also, since such a family is likely to seek public assistance and public housing accommodations.[11] The tenant is powerless to prevent this from happening because he cannot adequately defend himself in an unlawful detainer proceeding. The theoretical availability of other, later remedies[12] does not cure the disastrous effect of this procedural unfairness. *Wheeler v. Montgomery*, ... U.S. ..... (March 23, 1970); *Sniadach v. Family Finance Corp.*, *supra*.

The problem is widespread. There are an estimated seven million substandard dwellings nationally and many millions more that are deteriorating to that point.[13] A large number of these dwellings are in California and in other states that have similar procedural restrictions on the rights of a tenant.[14]

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11. In the appellants' city of Oakland, California, the waiting list for public housing is presently in excess of 3000 applicants.

12. The legal inadequacy of the other remedies relied on in the District Court opinion is discussed later in this jurisdictional statement.

13. *Douglas Commission*, *supra*, 66-76

14. e.g. *Oregon Rev. Stats.* § 105.105 et. seq.; *Wisconsin Stats. Ann.* §291.07.

In *Lindsey v. Skourtes* (No. 70-9, D. Oregon), the district court restrained the Oregon courts from evicting or otherwise entering judgment against the plaintiffs. The temporary restraining order was issued on January 20, 1970, and is still in effect. The issues in the *Lindsey* case are largely the same as in this case. The plaintiffs have contended that the prohibition of affirmative defenses and counterclaims under the Oregon summary eviction law violates the constitutional rights of tenants of substandard buildings.

C. IMPORTANT FACTUAL ISSUES ARE RAISED.

Appellants are not asking this court to accept on judicial notice any factual assertions regarding tenants of substandard housing or factual assertions on any other point. These are matters that should be adjudicated in a trial before the district court. However, the district court on its own motion granted summary judgment to the appellees, thereby precluding a factual determination of these issues. Appellants contend that summary judgment was improperly granted.

The California unlawful detainer law cannot be considered in a vacuum. In resolving a constitutional challenge to this law, a court must determine the law's "immediate objective", "ultimate effect" and "historical context". *Reitman v. Mulkey*, 387 U.S. 369, 373. *Accord, Yick Wo v. Hopkins*, 118 U.S. 356; *Anderson v. Martin*, 375 U.S. 399. The particular effect of the California unlawful detainer law on tenants of substandard dwellings is a material fact that properly precludes entry of summary judgment. Rule 56(c) Fed. R. Civ. P.[15]

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15. The California unlawful detainer law applies generally to all evictions. However, in weighing its effect appellants contend that particular attention should be given to the effect on tenants of substandard housing as a class. As this court stated in *Sniadach*, supra:

> A procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy procedural due process in every case. (*Supra*, at 340)

What is true of attachments should be true of summary evictions as well.

II. Appellants Have Been Deprived of Their Property Without Due Process of Law.

A. THE SCOPE OF THE ADJUDICATION UNDER THE CALIFORNIA UNLAWFUL DETAINER LAW.

In a California unlawful detainer action, the landlord secures a judgment for eviction of the tenant and a money judgment for rent and damages. The judgment is final in all respects. After judgment is entered for the landlord, the clerk of the court issues a writ of execution directing the sheriff to deliver the premises to the landlord and to levy on the wages or other assets of the tenant to satisfy the monetary portion of the judgment. The sheriff is also directed to deliver the furniture of the tenant to the landlord for the purpose of sale by the landlord to satisfy the judgment. C.C.P. §§ 681, 682, 1174. These ministerial acts occur without further hearing.

The substantive requirement of the law is that the landlord recovers a judgment for rent and damages and for forfeiture of the lease only if there has been a "default in the payment of rent". C.C.P. § 1174. A "default" is the "failure to perform an act or obligation legally required".[16] An affirmative defense or a counterclaim would, if proven, tend to show that no default has occurred.[17] Therefore, both are a necessary part of any proper determination of whether payment on the landlord's claim is legally required. A failure to allow a hearing on these issues precludes the

16. *Random House Dictionary of the English Language* (1967).

17. Moreover, under California law counterclaims between opposing parties are intrinsically related as a matter of substantive law. Co-existing claims, whether liquidated or unliquidated, are "deemed compensated so far as they equal each other". C.C.P. §440. This occurs automatically, with or without litigation, and it applies to claims between landlord and tenant. *Hauger v. Gates*, 42 Cal.2d 752, 269 P. 2d 609 (1954); *Jacob v. Carter*, 4 C.U. 543, 36 Pac. 381 (1894).

trial court from fairly determining the tenant's liability or non-liability. Yet, as the district court recognizes, the California practice has been to treat an unlawful detainer action as a "summary remedy" and to exclude affirmative defenses and counterclaims from the unlawful detainer hearing.[18]

The district court rationalizes this by saying that the issues in an unlawful detainer proceeding are limited to the "right of possession" (Appendix A 8). This statement is demonstrably incorrect insofar as the result of the action is concerned. The court does more than evict a tenant; it also enters judgment for rent and damages, or, in its discretion, for treble rent and damages. C.C.P. § 1174. The appellants have been adjudged personally liable for over $1,000. This statement is also incorrect insofar as it implies that issues relevant to the question of rent and damages are not relevant to the question of possession. Forfeiture of the lease properly occurs only if there is a "default in the payment of rent". Therefore, the exclusion of issues that would tend to defeat the claim for rent removes from the case issues that are vital to the tenant's defense.

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18. The unlawful detainer statute itself does not prohibit affirmative defenses and counterclaims, but the courts have interpreted them as being disallowed. *Knowles v. Robinson*, 60 Cal. 2d 620, 387 P. 2d 833 (1963); *Mercuro v. Hastings*, 110 Cal. 219, 42 Pac. 560 (1895); *Lakeside Park Assn. v. Keithly*, 43 Cal. App. 2d 54, 179 P. 2d 41 (1947); *Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512 (1912). District Court opinion (Appendix A 4, 5).

This contrasts with the ordinary rule of California procedure, which allows affirmative defenses and counterclaims in a common law action for the collection of rent and in a common law action for ejectment. *Lyke v. Pursley*, 171 Cal. App. 2d 417, 340 P. 2d 709 (1959); *Gillespie v. Hagans*, 90 Cal. 90, 27 Pac. 34 (1891).

B. DUE PROCESS REQUIRES A BALANCING OF INTERESTS.

The district court concludes that since the unlawful detainer law provides for a hearing it therefore complies with the procedural due process requirements (Appendix A-10). Appellants do not deny that a hearing, at least in form, is provided under the California unlawful detainer law. They contend, however, that the hearing is so limited in scope with respect to issues vital to a tenant's defense that it is tantamount to no hearing at all. The issues excluded from an unlawful detainer action are clearly important to establishing a tenant's liability or non-liability. The question, therefore, is whether a hearing that is so limited violates procedural due process.

The resolution of this issue requires a process of balancing. The requirements of procedural due process ultimately depend upon:

> [t] precise nature of the interest that has been adversely affected; the manner in which it was done, the reasons for doing it, the available alternatives to the procedure which was followed, . . . the balance of hurt complained of and accomplished. . . .

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (Justice Frankfurter concurring). Accord, *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886; *Hannah v. Larche*, 363 U.S. 420. It is clear that the mere formality of a hearing will not be sufficient if the hearing is unreasonably limited or if the procedure followed excludes important issues or evidence. *Wheeler v. Montgomery*, ... U.S. ....., (March 23, 1970); *Holt v. Virginia*, 381 U.S. 131; *Willner v. Committee on Character & Fitness*, 373 U.S. 96. The basic principle is that a full and fair hearing is required unless some other interest is of over-riding importance. 1 Davis, *Administrative Law Treatise* 412 (1958).

The nature of the interest benefited must be considered. In *McGrath, supra, McElroy, supra,* and *Hannah, supra,* the procedural rights of individuals were limited to protect some governmental interest. Where, however, only competing, private economic interests are involved, the guidelines have been set forth in *Sniadach v. Family Finance Corp., supra.* In *Sniadach,* the Court balanced the interests of the creditor and the debtor and concluded that the debtor must be allowed a hearing that properly adjudicates the question of his liability before the creditor can be allowed to use legal process to deprive him of a substantial portion of his wages. In this case the issues and the interests are virtually the same: The tenant faces loss of his dwelling, loss of his furniture and loss of a substantial portion of his wages through a summary process. Due process, therefore, requires a prior hearing that properly adjudicates the question of his liability.[19]

The purpose of the summary procedure under the California unlawful detainer law is to benefit the economic interests of landlords. The district court recognizes this in adopting the rationale of *Knowles v. Robinson,* 60 Cal. 2d 620, 387 P. 2d 833 (1963) and *Telegraph Avenue Corp., v.*

19. *Sniadach* indicates that a summary procedure may meet the requirements of due process in "extraordinary situations". Of the four cases cited as examples, three involved a competing governmental interest. *Fahey v. Mallonee,* 332 U.S. 245; *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594; *Coffin Bros v. Bennett,* 277 U.S. 29. The remaining case affirmed the validity of a summary attachment procedure that was used to effect *quasi in rem* jurisdiction. *Ownbey v. Morgan,* 256 U.S. 94. Two safeguards in the procedure in *Ownbey* should be noted: First, the statute was narrowly drawn to apply only to out-of-state debtors. Second, the debtor was allowed to raise his defenses and counterclaims after posting a bond. Neither safeguard is present in the California unlawful detainer law.

Raentsch, 205 Cal. 93, 269 Pac. 1109 (1928). District court opinion (Appendix A-8, 9). However, the district court makes only a cursory attempt to analyze the harm that this summary procedure causes to tenants of substandard buildings. The court makes no attempt whatsoever to examine alternative procedures that would be less harmful to tenants or to consider social and economic conditions that may have changed since the enactment of this summary procedure.

In short, the district court makes no attempt to balance the competing economic interests or to justify a departure from the rule set forth in *Sniadach*, supra. Appellants contend that no such justification exists. The summary procedure under the California unlawful detainer law is neither logically necessary nor socially justifiable.

C. NO LEGITIMATE INTEREST OF LANDLORDS IS SERVED BY DENYING A TENANT A FAIR AND PROPER HEARING.

1. The matter can be swiftly adjudicated.

Appellants do not object to a procedure enabling a landlord to obtain quick recovery of the premises when such recovery is warranted. Hence, they do not object to a preferential trial setting or a quick adjudication of an unlawful detainer suit. There is no reason, however, why the trial court cannot listen to *both* parties without any significant delay in court procedure. The tenant who is living in conditions that threaten his health and safety is just as anxious as the landlord to have his claims adjudicated quickly. Some states allow tenants to raise affirmative defenses and counterclaims, and they do so without impinging on the rights of landlords. *Michigan Comp. Laws* § 600.5637; *McKinney Cons. Laws of New York Ann.* § 49.5-743. The

American Bar Foundation recommends that all defenses and counterclaims be allowed.[20]

The procedure could be swift and still be fair. The legislature might limit the time for discovery and preparation, limit the issues and claims to those arising out of the leasehold, limit counterclaims to the amount of the landlord's claim, provide for deposit of rent in court, etc. Limitations on the procedural rights of the parties would not constitute a denial of due process if they are imposed in a fair and even-handed manner.

2. A landlord loses no substantive rights.

A fair hearing for a tenant would not deprive a landlord of any substantive rights or put a landlord at a procedural disadvantage. A tenant could not simply live on the premises rent free. Proof of a tenant counterclaim would still allow a landlord to recover rent or damages to the extent that they are not offset by the counterclaim. Proof of a tenant defense might render the lease agreement unenforceable, but it would not preclude the landlord from recovering a reasonable rental for the premises under *quantum meruit* principles.[21] If after proof of the tenant defense or counterclaim the court finds that some rent is still in default, the court could properly declare the lease forfeited and order the tenant evicted. Under such

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20. *Model Residential Landlord-Tenant Code* (tentative draft) § 3-210:

> At the time when the petition is to be heard, the defendant, or any person in possession or claiming possession of the dwelling unit, may answer, orally or in writing. If the answer is oral the substance thereof shall be endorsed on the petition. *The answer may contain any legal or equitable defense, or counterclaim.* (Emphasis added.)

21. *Samuels v. Ottinger*, 169 Cal. 209, 146 Pac. 638 (1915); *Ellingson v. Walsh, O'Connor and Barneson*, 15 Cal. 2d 673, 104 P. 2d 507 (1940).

procedure the landlord would obtain nothing less—and nothing more—than he is entitled to as a matter of substantive law.

3. Rental of a substandard dwelling violates public policy.

The rationale for the summary procedure under the California unlawful detainer law is that it allows the landlord to re-rent the building quickly. This rationale breaks down completely if the tenant can prove that the building is substandard under California law.[22] A substandard building must either be "repaired, rehabilitated, demolished or removed". 8 *California Administrative Code* § 17926. Violation of this regulation is a misdemeanor. *California Health and Safety Code* § 17995. Obviously, no public policy is served if the effect is to enable a landlord to violate further laws designed to protect the health and safety of his tenants.

D. TENANTS OF SUBSTANDARD BUILDINGS ARE SUBSTANTIALLY HARMED BY THE CURTAILMENT OF THEIR PROCEDURAL RIGHTS.

1. The loss of the dwelling is important.

A tenant in California may be deprived of the possession of his dwelling without a full hearing on whether there

22. Title 8 *California Administrative Code* § 17925:

> Any building or portion thereof . . . in which there exists any of the following listed conditions to an extent that endangers life, limb, health, property, safety or welfare of the public or the occupants thereof, *shall be deemed and hereby is declared to be a substandard building:*
>
> (a) inadequate sanitation . . .
> (b) structural hazards . . .
> (c) nuisance . . .
> (d) hazardous wiring . . .
> (e) hazardous plumbing . . .
> (f) hazardous mechanical equipment . . .
> (g) faulty weather protection . . .
> (h) fire hazard . . .
> (i) faulty materials of construction.
>
> (Emphasis added)

are proper grounds for the forfeiture of the lease. This constitutes the loss of a legal right[23] as well as the loss of an important economic right.[24] Given the gross disequilibrium between supply and demand, possession of even a substandard dwelling unit must be considered a valuable right.

2. The loss of wages and other income is substantial.

A tenant in California may have a judgment for rent and damages entered against him without a full hearing on whether the money is actually owed. The amount of money involved may be the single largest expense of a low-income tenant.[25] This is especially true since the court may in its discretion enter the judgment for treble the amount. C.C.P. § 1174. In *Sniadach v. Family Finance Corp., supra,* this court struck down a Wisconsin statute that deprived a person of 50% of his wages. The potential loss of income to the low-income tenant under the California law is as great or greater than the loss of income involved in the *Sniadach* case.

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23. *Mendoza v. Small Claims Court of Los Angeles Judicial District,* 49 Cal. 2d 668, 321 P. 2d 9 (1958).

24. The shortage of low-income units nationally has been reliably estimated at eleven million. *Douglas Commission, supra,* 73-74. In the appellants' City of Oakland, California, there is a present shortage of ten thousand low-income units. *Oakland Planning Department, Oakland's Housing Supply* (1968), 57.

25. Nationally, 77% of tenants with incomes under $2,000 per year pay 35% or more of their income for rent. 32% of tenants with incomes between $2,000 and $3,000 pay 35% or more of their incomes in rent. *Douglas Commission, supra,* 77. Two-fifths of all Oakland tenants paid more than 25% of their income in rent from 1960 to 1966. *Oakland's Housing Supply, supra,* 57.

3. The defenses and counterclaims that have been excluded are substantial.

The defenses and counterclaims that are excluded in an unlawful detainer action would tend to defeat or diminish the claim that the lease should be forfeited. The possible tenant claims[26] and defenses[27] are substantial. Proof of any of these theories would defeat or diminish the landlord's claim that the tenant owes him any money.[28] A tenant's defenses and counterclaims are directly related to the con-

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26. e.g., a tenant may sue for deprivation of peaceful possession, *Tooke v. Allen*, 85 Cal. App. 2d 230, 192 P. 2d 894 (1948); for breach of covenant to repair, *Mills v. Ruppert*, 167 Cal. App. 2d 58, 333 P. 2d 818 (1959); *Noble v. Tweedy*, 90 Cal. App. 2d 738, 203 P. 2d 778 (1949); for damages either in tort or contract resulting from the cutting off of utilities, *Jones v. Kelly*, 208 Cal. 251, 208 Pac. 942 (1929); for infliction of mental and physical distress, *Farvour v. Geltis*, 91 Cal. App. 2d 603, 205 P. 2d 424 (1949); for property damage resulting from violations of the Health and Safety Code, *Ewing v. Balan*, 168 Cal. App. 2d 619, 336 P. 2d 561 (1959); for recovery of a rent deposit when an infestation of vermin results in constructive eviction, *Buchner v. Azulai*, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967); for breach of a covenant of quiet enjoyment, *Agoure v. Lewis*, 15 Cal. App. 71,113 Pac 984 (1897).

27. e.g., a landlord's breach of covenant may constitute a failure of consideration, *Medico-Dental Building Co. v. Horton and Converse*, 21 Cal. 2d 411, 132 P. 2d 457 (1942). The tenant may also raise the illegality of the lease agreement as a defense. *Shepard v. Lerner*, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960); *Lyke v. Pursley*, 171 Cal. App. 2d 417, 340 P. 2d 709 (1959), *Howell v. City of Hamburg Co.*, 165 Cal. 172, 131 Pac. 130 (1913).

28. The general trend is towards th expansion of the substantive rights of tenants, see, generally, Sax & Hiestand, *Slumlordism as a Tort*, 65 Mich. L. Rev. 869 (1967); Levi, supra, 66 Colum. L. Rev. 275 (1966); Loeb, supra, 21 Hastings L.J. 287 (1970); note, *Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code*, 56 Geo. L.J. 920 (1968). *Brown v. Southall Realty Co.*, 237 A. 2d 834 (D.C. Ct. App. 1968); *Majen Realty Corp. v. Glotzer*, 61 N.Y.S. 2d 195 (Mun. Ct. 1946).

dition of the building.[29] If the building is substandard, the potential defenses and claims of the tenant are likely to be quite substantial. Not only is the likelihood of damage and injury to the tenant increased, but the lease agreement itself is illegal.[30]

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29. In the unlawful detainer proceedings in the Oakland-Piedmont Municipal Court the appellants alleged that the following conditions existed in their building:

a) the elevator does not function properly and is unsafe to operate;
b) the carpeting is ripped and unsafe;
c) the toilet floods and does not function properly;
d) the hot water tap does not function properly;
e) electrical outlets are exposed and dangerous;
f) there is an inadequate number of fire extinguishers for the building;
g) the garage chute has not been properly cleaned or maintained and is a source of attraction for insects;
h) the apartment is infested with cockroaches and other pests;
i) the windows are improperly fitted and constitute a danger to the security of the apartment;
j) portions of the exterior of the building are on the verge of collapse and constitute a hazard.

30. Title 8 *California Administrative Code* §§ 17925, 17926; *California Health & Safety Code* §17995; *Shepard v. Lerner, supra; Brown v. Southall Realty Co., supra.*

4. The relationship between rent and repairs is interdependent.

A tenant of substandard housing lives in conditions that constitute more than mere anoyances or minor breaches of contract. The conditions are such as to endanger the health and safety of himself and his family. Obviously, there is often a cause and effect relationship between rent and repairs. If a low-income tenant suffers loss of income or personal injuries because of conditions on the premises or expends money for service or repairs that the landlord should have provided, he is likely to stretch an over-burdened budget to the point where he is unable to pay some

or all of the rent. If he cannot offset these amounts in an unlawful detainer action, he suffers an obvious injustice.

The district court invokes the doctrine of "independent covenants" and indicates that it is a bar to certain tenant defenses. However, the court does not suggest that this doctrine bars all defenses. The "independent covenant" doctrine has not, for example, been invoked in California as a bar to the defense that the lease agreement is illegal.[31] Moreover, it seems clear that this doctrine is not a rule of substantive law in California. It is clearly inconsistent with the automatic offset of counterclaims,[32] and it does not bar the defense of a failure of consideration in an action to collect rent.[33] The independent covenant doctrine has, however, survived in California as a procedural rule, prohibiting certain defenses and counterclaims in unlawful detainer actions.[34] This doctrine, therefore, is simply another manifestation of the procedural unfairness of the California unlawful detainer law.

E. THE ALTERNATIVE PROCEDURES SUGGESTED BY THE DISTRICT COURT DO NOT SATISFY THE REQUIREMENTS OF DUE PROCESS.

1. A tenant cannot protect his rights if he is required to move out of his dwelling.

The district court states that a tenant can fully protect his rights if he abandons possession of the premises (Ap-

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31. *Shepard v. Lerner, supra; Lyke v. Pursley, supra; Howell v. City of Hamburg, supra.* District court opinion (Appendix A—7).

32. C.C.P. §440; *Hauger v. Gates*, 42 Cal. 2d 752, 269 P. 2d 609 (1954).

33. *Medico-Dental, supra.*

34. *Ibid.*

c.f. *Malick v. Kellogg*, 95 N.W. 372, 118 Wis. 405 (1903); *Kellogg v. Malick*, 103 N.W. 1116, 125 Wis. 239 (1905).

pendix A-10).[35] The defect in this alternative is clear: The tenant is forced to give up one right to protect another. A defense or counterclaim against a rent and damage claim is also a defense against the forfeiture of the lease. However, the procedure suggested by the district court would require the tenant to give up in advance his defense to the forfeiture of the lease. This constitutes an unconstitutional condition to the exercise of a right. *Garrity v. New Jersey*, 385 U.S. 493; note, *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1968).

This alternative breaks down completely when applied to tenants of substandard housing. Members of this class cannot meet this precondition to the exercise of their rights. The procedure under California unlawful detainer law is swift, and the tenant would have to move himself and his family within a couple of weeks. Since the demand for low-income housing far exceeds the supply, it is clearly unreasonable to require such a tenant to abandon his dwelling and find another, satisfactory dwelling within such a narrow time span. This fact becomes even more obvious when the class as a whole is considered. If every tenant of a substandard dwelling in California abandoned his dwelling to protect his rights, it can easily be shown that many such tenants would be homeless. Many more tenants would be forced to move into substandard dwellings as bad or worse than the ones they left. The result would be a cruel game of musical chairs that the low-income tenant could never win. The assumption that tenants of substandard dwellings can be required to move without forfeiting their rights is

35. In effect, if possession is no longer at issue, the special procedural rules of unlawful detainer law no longer apply and the action becomes a common law action for collection of rent. *Knowles v. Robinson, supra.*

an assumption with no basis in fact. The district court should be directed to reconsider this assumption in light of the factual context in which the California unlawful detainer law operates.[36]

2. A separate lawsuit by the tenant is not an adequate alternative.

The district court suggests that a separate tenant lawsuit is an adequate alternative to the full right of defense in an unlawful detainer action. (Appendix A-10). However, this alternative is expensive and probably futile. A separate lawsuit initiated by the tenant would not prevent the landlord from evicting him in an unlawful detainer action. Procedurally, a landlord has all the advantages in a suit filed by a tenant that the tenant is denied in an unlawful detainer action. The landlord can raise affirmative defenses and counterclaims, stay judgment on appeal, etc. Some tenant defenses, e.g. illegality of the lease agreement, would be difficult to sustain as an independent action for damages and would probably be lost. Moreover, an independent suit means that the tenant must pay court costs and attorney's fees twice: once in his own suit and once to defend against an unlawful detainer action. The unfairness of this alternative is clear. *Armstrong v. Manzo*, 380 U.S. 545.

A tenant suit is not subject to preferential setting and is not likely to come to trial quickly. Therefore, even if the tenant ultimately succeeds in recovering damages from the landlord sufficient to offset the wages, bank accounts, furniture, etc. that have been garnished or given up during the intervening period, it is obvious that the tenant would lose the use and possession of these assets for a considerable length of time. Loss of wages and other assets for even a temporary period is a violation of due process unless it is preceded by a proper hearing. *Sniadach v. Family Finance Corp., supra.*

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36. See, *Majen Realty Corp. v. Glotzer*, 61 N.Y.S. 2d 195 (Mun. Ct. 1946); *Johnson v. Pemberton*, 97 N.Y.S. 2d 153 (Mun. Ct. 1950).

3. Rent withholding under California Civil Code §1942 is not an adequate alternative.

The district court implies that rent withholding and repair under California Civil Code § 1942 offers an alternative means of protecting a tenant's rights (Appendix A 7, 8). The principal defect of this remedy is that the landlord usually requires the tenant to waive it as a condition of rental. Since low income housing is in short supply, the tenant in such a situation has no bargaining power.[37] Appellants would establish on remand that they were required to waive this remedy and that substantial numbers of the class represented are likewise required to do so. The California courts have sustained the validity of such waivers.[38] This and other defects of this remedy render it virtually useless. See generally, Loeb, *supra*, 21 Hastings L.J. 287, 290-293.[39]

37. The lease or rental agreement that the low income tenant is forced to sign is "one which grants to the tenant the right to pay rent and precious little else." Levi, *supra*, 66 Colum. L. Rev. 275.

38. *Arnold v. Kemp*, 69 Cal. 143, 146 Pac. 423 (1915).

39. Some of the other defects of this remedy are:

a) rent deduction cannot be made for repairs to areas held in common with other tenants or with the landlord. *Buckner v. Azulai*, *supra*. This would exclude repairs of many of the defects in the building in which appellants resided;

b) Necessary repairs are often considered "improvements", and, therefore, not deductible. *Wall Estate Co. v. Standard Box Co.*, 20 Cal. App. 311, 128 Pac. 1020 (1912);

c) Rent deduction for repairs may subject the tenants to eviction under a 30-day notice procedure. *Accola v. Bonds*, No. 392428, Cal. Sup. Ct., Alameda County (notice of appeal filed October 30, 1969); *Bonds v. Schweiger*, No. 393241 Cal. Sup. Ct., Alameda County (certified for appeal January 2, 1970);

d) Repairs can only be made "where the cost of such repairs do not require an expenditure greater than one month's rent." *California Civil Code* §1942. Thus, many important repairs are automatically excluded, including many repairs to the apartments in which the appellants resided;

e) This procedure only purports to allow the tenant to make repairs "or stipulations." Hence, it provides no method of recouping any damages for injuries to members of the tenant's family or for other financial losses that might properly give rise to a counterclaim.

III. Appellants Have Been Denied the Equal Protection of the Laws.

A. CALIFORNIA TENANTS ARE DENIED EQUAL ACCESS TO THE COURTS.

This court has long held that the civil procedure rules of a state must treat litigants in an even-handed manner. In *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, the Court condemned state legislation that permitted a plaintiff who sues a railroad company to obtain attorney's fees while denying a correlative right to the defendant.[40] This court has made it clear that equal access to the courts is a fundamental right that cannot be defeated by technicalities or inconveniences. *Griffin v. Illinois*, 351 U.S. 12; *Burns v. Ohio* 360 U.S. 252; *Pennsylvania R. Co. v. Dent*, 360 U.S. 548 (dissenting opinion by Black, J., Warren, Ch. J., and Douglas, J.)

The California unlawful detainer law presupposes an unequal access to the courts, and this inequality favors landlords at the expense of tenants.[41] The cumulative effect of

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[40] "The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts or other litigants under like conditions and with like protection . . . they do not stand equal before the law. They do not receive its equal protection." *Gulf, supra*, at 153.

[41] The landlord and tenant must compete on totally unequal terms:

a) In an unlawful detainer action the tenant may not raise affirmative defenses or counterclaims. In a lawsuit filed by a tenant either of these may be raised by the landlord.

b) In an unlawful detainer action the landlord may obtain treble damages. Treble damages are not allowed in a tenant suit.

c) An unlawful detainer action can be tried and reduced to judgment within a very few weeks after service of process. A tenant suit must wait months for a trial date on the ordinary trial calendar.

d) Findings of fact and conclusions of law must be entered in support of a judgment in any tenant's suit where the amount sought exceeds $200 (C.C.P. §632). No such requirement exists for judgments obtained in an unlawful detainer action.

these inequalities works an even further discrimination upon tenants. Since, for example, an unlawful detainer action can never result in a money judgment for the tenant (because of the prohibition against counterclaims), the discretionary power of the judge to disallow a stay of execution on appeal can only benefit the landlord. The tenant will never be in a situation where he can take advantage of the court's discretion.

B. THE UNLAWFUL DETAINER LAW IS UNDER-INCLUSIVE BECAUSE IT EXCLUDES TENANTS FROM ITS BENEFITS.

This court has held invalid classifications where the objective that the legislature sought to achieve shows that the classification is under-inclusive, e.g., *Reed v. Reed*, 404 U.S. 71. The California unlawful detainer law is under-inclusive in providing a summary remedy for landlord claims and not for tenant claims and defenses when those claims and defenses arise out of the same transaction.

There is nothing inherent in the potential claims of a landlord that requires that they be handled more swiftly than tenant claims. If anything, the reverse is true. A landlord may believe he needs a quick adjudication of his rights to protect his income from the property, but the tenant of a condemned dwelling needs quick help from the courts to protect him and his family from conditions that threaten their health and safety. Since both parties are before the court and the subject matter that each seeks to have litigated is the same, the preference given to landlord claims under the unlawful detainer law is arbitrary and capricious.

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[1] If a tenant obtains judgment in a suit brought against a landlord, the landlord may stay the judgment automatically by posting an appeal bond in an unlawful detainer action, a stay with or without an appeal bond is totally discretionary and the trial judge and his discretion may not be interfered with by

Administrative convenience cannot be the justification for this arbitrary classification. There is no reason why the trial courts cannot listen to the claims of both parties and still give the matter preferential treatment on the calendar. The actual time consumed by the tenant in presenting his case is minimal, and it need not delay the rendering of a judgment in the matter. In fact, the argument for administrative convenience cuts the other way: the present system presupposes that the landlord will bring his claims in one action and the tenant will bring his claims in a later action. The court is therefore subjected twice to litigation arising out of the same transaction. In any case, administrative convenience cannot be allowed as justification for an impermissible classification. *Rinaldi v. Yeager*, *supra*.

The district court relies on *Telegraph Avenue Corp. v. Raentsch*, 205 Cal. 93, 269 Pac. 1109 (1928) to support the proposition that the exclusion of affirmative defenses and counterclaims is based on a reasonable classification (Appendix A, p. 9). However, the *Telegraph Ave.* case and the district court opinion are both based on the same erroneous assumptions: 1) that an unlawful detainer action adjudicates only the question of possession, and 2) that tenant defenses and counterclaims are irrelevant to the issue of possession. As appellants have previously shown, both of these assumptions are incorrect.

CONCLUSION

For the reasons stated, appellants believe that the constitutional issues in this case are substantial. The appellants therefore urge that the Court take jurisdiction and set the matter for further hearing.

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Appendix A

Filed Jan. 5, 1970

United States District Court
Northern District of California

No. 52196

Reginald Hutcherson, et al., *Plaintiffs,*

vs.

Laurie Lehtin, et al., *Defendants.*

MEMORANDUM OF DECISION

Before DUNIWAY, Circuit Judge, SWEIGERT and LEVIN, District Judges.

SWEIGERT, District Judge

This is a class action filed herein under the provisions of 42 U.S.C. § 1983 (Civil Rights Act) by six tenants of an Oakland, California apartment house who bring this action in their own right and on behalf of all those who are forced by their poverty to live in rental units which do not conform to the applicable Municipal Housing Code.

The defendants are Laurie Lehtin, owner-lessor of the subject apartment house; Hon. Lyle E. Cook, Presiding Judge of the Alameda County Superior Court; Hon. Stafford P. Buckley, Presiding Judge of the Oakland-Piedmont Municipal Court and Frank I. Madigan, Sheriff of the County of Alameda.

The complaint challenges the constitutionality of the California unlawful detainer statute (C.C.P. § 1161 et seq.) and for this reason, pursuant to Title 28 U.S.C. § 2281, this three-judge federal district court was convened.

The case is presently before the court on plaintiffs' application for a preliminary injunction restraining the state courts from enforcing the statute and on defendants' motion to dismiss the complaint.

The record before the court consists essentially of an unverified complaint, an answer and certain exhibits and affidavits attached to memoranda in support of and opposition to the motions.

THE FACTS

The undisputed facts of the case are essentially that plaintiffs, protesting the condition of their apartments, refused to pay rent; that, pursuant to C.C.P. § 1161(a), the landlord caused these tenants to be served with a notice to pay rent or quit; that the tenants subsequently informed the landlord that they were withholding rent to repair dilapidations; that the tenants did not, however, make any repairs nor did they abandon the premises or pay any further rent.

The landlord then brought unlawful detainer actions in which eviction judgments for surrender of the premises and payment of back rent were entered against plaintiffs by the defendant judge of the Oakland Piedmont Municipal Court.

In the Municipal Court proceedings plaintiffs had filed answers setting up the following defenses: (1) that the landlord had instituted the unlawful detainer suit in retaliation against plaintiffs' expressed intention to protest

the condition of the premises to the appropriate public officials and other interested parties; (2) that the landlord failed to perform certain alleged express covenants to provide recreation facilities, maintain shrubbery and paint the apartments, and (3) that the rental agreement was an illegal contract because the premises were not in conformity with applicable building codes.

These defenses were stricken from plaintiffs' answer by the Municipal Court trial judge upon the ground that they were irrelevant to the issue of right of possession.[1]

Plaintiffs then moved for a stay of execution of the judgment pending an appeal. The court denied this motion pursuant to C.C.P. § 1176, which gives the judge before whom the case was tried the exclusive discretionary power to stay proceedings upon such judgment pending appeal.

PLAINTIFFS' CONTENTIONS

Plaintiffs contend that the California unlawful detainer statute, if interpreted as precluding the assertion of the three defenses above set forth, is violative of Fourteenth Amendment rights to equal protection and due process of law, and, as to the first defense above noted, also violative of First Amendment rights to freedom of speech and petition.

Before considering these constitutional contentions, we first consider the threshold issue as to whether plaintiffs' asserted defenses were stricken in the Municipal Court pursuant to the clear requirement of the California unlaw-

1. Prior to the Municipal Court trial, defendant, the Presiding Judge of the California Superior Court for the County of Alameda, denied the plaintiffs' application for a writ of prohibition delaying the unlawful detainer trial until after the taking of the landlord's deposition. This denial was also based upon the ground that the deposition evidence would be relevant only to the tenants' proposed affirmative defenses which were not germane to the right of possession and would be inadmissible in an unlawful detainer action.

ful detainer statute, or settled interpretation thereof by the California higher courts, or whether they were at most erroneously stricken, and the striking reviewable and, if necessary, correctable on appeal to the California courts.

THE STATUTE

The California unlawful detainer statute (C.C.P. § 1161 et seq.) provides a statutory remedy, summary in its nature, whereby a landlord may promptly recover possession of real property from a tenant continuing in possession beyond expiration of the term, or (as in the present case) after breach of the tenant's covenant to pay rent.

The statute provides for a pre-suit three-day notice to the tenant to quit or pay rent (C.C.P. § 116(2)) and a further three-day notice by summons to answer the complaint (C.C.P. § 1167). A tenant may appeal in the event of an adverse judgment (C.C.P. § 1178).

California law also provides that the lessor of a building intended for the occupation of human beings must, in the absence of agreement to the contrary, put it into a condition fit for such occupation and repair all subsequent dilapidation thereof which renders it untenantable (Cal. Civ. Code § 1941), and that, if within a reasonable time after notice to the lessor of dilapidations which he ought to repair he neglects to do so, the lessee may repair the same himself where the cost of such repair does not require an expenditure greater than one month's rent and deduct the expenses of such repair from the rent, or the lessee may vacate the premises and be discharged from further payment of rent or performance of other conditions (Cal. Civ. Code § 1942).

The unlawful detainer statute does not expressly preclude assertion of any defenses. It merely provides that

the defendant may appear and *answer* or *demur* (C.C.P. § 1170). California court interpretation, however, is generally to the effect that only defenses relevant to the "right of possession" may be asserted by an unlawful detainer defendant.

Thus, a tenant may defend against a landlord's claims *only* by showing that there has been no failure of the rent condition and accordingly, that there should be no forfeiture. *Arnold v. Kreutzmann*, 169 Cal. 143, 146 Pac. 423 (1915); or that, pursuant to statutory authority, the tenant has withheld up to one month's rent to make the premises fit for human habitation (Cal. Civ. Code § 1942); or, appealing to the equity side of the court, that it would be inequitable to evict him as against a landlord who is acting unlawfully. *Abstract Investment Co. v. Hutchinson*, 22 Cal.Rptr. 309 (1962).

Neither set-off, counterclaim nor cross-complaint may be pleaded even though they grow out of the subject matter of the complaint. *Knowles v. Robinson*, 36 Cal. Rptr. 33, 36 (1963); *Lakeside Park Assn. v. Keithly*, 43 Cal.App.2d 418, 110 P.2d 1055 (1941).

FIRST DEFENSE

As to the first asserted defense, i.e., retaliation for reporting code violations to the authorities, we have been cited to no California case which would preclude assertion of such a defense. In fact, the California courts have previously allowed a similar constitutional defense to be asserted in unlawful detainer actions. In *Abstract Investment Co. v. Hutchinson, supra*, an unlawful detainer action, a California District Court of Appeal held that a tenant should have been permitted to produce proof of his special defense that his eviction was sought wholly on the ground of his

race and that the real reason for his eviction was that he was a Negro. See also, *Rose v. Hewes Co.*, No. 393347, (Cal. Superior Court, Alameda County, filed September 16, 1969), 3 Clearinghouse Review 142, 175 (October 1969) in which a temporary restraining order was granted preventing a "retaliatory eviction."

Recent decisions elsewhere have held that exclusion of the defense of retaliatory eviction, even in summary proceedings, violates the First and Fourteenth Amendment right, if not the duty, of a citizen to inform the government of a violation of the law. See *Edwards v. Habib*, 366 F.2d 628 (D.C. Cir. 1965); *Hosey v. Club Van Cortland*, 299 F.Supp. 501 (S.D.N.Y. 1969); *Hubbard v. Alexandria Hotel Co.*, 69 Civ. 1385 (S.D.N.Y. May 1, 1969), 3 Clearinghouse Review 49 (June, 1969); and *Hoyt v. LaChance*, No. 12,598 (D.Conn. June 25, 1968), 14 Well.L.Bull. 11 (Sept. 1968). See also, *Gillibeau v. City of Richmond*, No. 23062, Ninth Circuit, October 13, 1969 and *Lawrence v. Benaminer Realty Corp.*, 69 Civ. 3405 (S.D.N.Y. 1969), 3 Clearinghouse Review 176 (Nov. 1969).

Under well-established principles of law a federal court should abstain (except under special circumstances) from exercising its jurisdiction to declare a state statute unconstitutional when, although state action is being challenged as contrary to the federal Constitution, the state law remains unsettled and there is possibility that the state court might resolve the question on appeal in accordance with constitutional standards. See *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and *Harrison v. National Ass'n. for the Advancement of Colored People*, 360 U.S. 167 (1959). See also *Hosey v. Van Cortland*, *supra*, and *Hoyt v. LaChance*, *supra*, wherein federal district courts in New York and Connecticut abstained under similar circumstances for the same reason.

About California judicial authority to the contrary, we consider the question of the propriety in an unlawful detainer action of the first defense here involved as an open question and we therefore abstain from ruling on the constitutional implications of its application to the Municipal Court.

SECOND DEFENSE

Turning to the second defense asserted by plaintiffs here, to wit, a breach by the landlord of a covenant to repair, maintain or improve, it has been held in California that the landlord's covenant to repair and the tenant's covenant to pay rent are independent of each other and, unless the landlord's covenant is expressly or impliedly made a condition precedent to the tenant's duty to pay rent, a breach of the covenant to repair does not excuse the tenant's default in the rent and that such defense is irrelevant to the issue of right of possession and may not be asserted in an unlawful detainer action. [Citations omitted.] However, [illegible] Cal. App. 2d 54, 179 P. 2d 41 (1947); Witkin, Summary of California Law, Real Property, Section 279, p. 1107.

THIRD DEFENSE

As to the third defense asserted by plaintiffs herein, to wit, disturbance, destruction or impairment of the premises and essential value, the California courts have also held that a tenant to be entitled to the relief of injunction and impoundage in an unlawful detainer action [illegible] has been held that where a building designed for human habitation is in a dangerous condition and unfit for occupancy, the tenant may, as provided by Civil Code, Section 1942, repair, either such repairs himself and withhold the expense thereof, or abandon the premises and be relieved from

and a statistical or state statement was presented and, further, the court noted that the statute was not narrowly drawn to meet any such unusual condition.

In the present case, the basically different California statute is such that the tenant cannot be evicted until after receipt of a further summons to court and a trial, if the tenant raises such issues as are relevant to the right of possession.

The issue, therefore, is not one of prior notice nor even of prior hearing, except in respect to whether the statute of a California can constitutionally limit the tenant's defenses in an unlawful detainer trial to such as are relevant to the right of possession. A matter we have resolved in the affirmative so far as equal protection is concerned.

In view of the purpose of the unlawful detainer statute and the remedies foregoing available to the tenant under California law, we also conclude that limitation of the defenses available to a tenant retaining possession, and refusing to pay rent, is not violative of plaintiffs' right to due process of law.

CONCLUSION AND ORDER

For the foregoing reasons we conclude that plaintiffs' motion for a preliminary injunction should be, and is hereby, denied and that defendants' motion to dismiss, treated as a motion for summary judgment as allowed by Rule 12(b), Fed. R. Civ. P., should be and is hereby granted under Rule 56(c) as to all issues raised by the pending complaint.

United States District Court
Northern District of California

Filed March 10, 1970

Reginold Hutcherson, et al., Plaintiffs, vs. Laurence Lehtin, et al., Defendants.		Civil No. 52196

FINAL JUDGMENT

It Is Ordered, Adjudged, Decreed and Declared that the California Unlawful Detainer Statute, California Code of Civil Procedure §1161 *et seq.*, is valid and constitutional as against the contrary claims of plaintiffs described in the Memorandum Decision of this Court filed January 5, 1970, and that plaintiffs take nothing by their complaint against defendants in the above entitled matter.

Dated: March 10, 1970

Ben C. Duniway*
United States Circuit Judge

Gerald S. Levin
United States District Judge

W. T. Sweigert
William T. Sweigert
United States District Judge

*Judge Duniway, not available for signature of this order, has concurred in the result.

Appendix B

Calif. Code of Civil Procedure

§ 1159.

Forcible Entry Defined. Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property; or,

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession.

§ 1160.

Forcible Detainer Defined. Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

§ 1161.

A tenant of real property, for a term less than life, or the executor or administrator of his estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer

1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him; provided such expiration is of a nondefault nature however brought about without the permission of his landlord, or the successor in estate of his landlord, if any there be; including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant or employer and employee or principal and agent or licensor and licensee has been lawfully terminated or the time fixed for such occupancy by the agreement between the parties has expired; but nothing in this subdivision contained shall be construed as preventing the removal of such occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed by the Civil Code.

2. When he continues in possession, in person or by subtenant, without the permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him and if there is a subtenant in actual occupation of the premises, also upon such subtenant.

Such notice may be served at any time within one year after the rent becomes due. In all cases of tenants upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of the term without any demand of possession or notice to quit by the landlord or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by

possession of the landlord or successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. When he continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there is a subtenant in actual occupation of the premises, also, upon such subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease violated by the lessee cannot afterward be performed, then no

notice as last prescribed herein, need be given to said lessee or his subtenant demanding the performance of the violated conditions or covenants of the lease.

A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his unlawful detention of the premises underlet to him or held by him.

4. Any tenant, subtenant, or executor or administrator of his estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his lease, or maintaining, committing or permitting the maintenance or commission of a nuisance upon the demised premises or using such premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provision of this chapter.

5. When he gives written notice as provided in Section 1946 of the Civil Code of his intention to terminate the hiring of the real property, or makes a written offer to surrender which is accepted in writing by the landlord, but fails to deliver up possession at the time specified in said written notice, without the permission of his landlord, or the successor in estate of the landlord, if any there be.

§ 1161a

In either of the following cases, a person who holds over and continues in possession of real property, after a three-day written notice to quit the same, shall have been served upon him, or if there is a subtenant in actual occupation of

the premises, also upon such subtenant, as prescribed in Section 1162 of the Code of Civil Procedure, may be removed therefrom as prescribed in this chapter.

1. Where the property has been duly sold by virtue of an execution against him, or a person under whom he claims, and the title under the sale has been duly perfected.

2. Where the property has been duly sold, upon the foreclosure, by proceedings taken as prescribed in this code, of a mortgage, or under an express power of sale contained therein, executed by him, or a person under whom he claims, and the title under the foreclosure has been duly perfected.

3. Where the property has been duly sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by him, or a person under whom he claims, and the title under the sale has been duly perfected.

4. Where the property has been duly sold by him, or a person under whom he claims, and the title under the sale has been duly perfected.

§ 1162

The notices required by sections 1161 and 1161a may be served, either:

1. By delivering a copy to the tenant personally; or,

2. If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence; or,

3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a

person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

§ 1162a

In any case in which service or exhibition of a commissioner's or sheriff's deed is required, in lieu thereof service of a copy or copies of such deed may be made as provided in section 1162 of this code.

§ 1164

No person other than the tenant of the premises and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the nonjoinder of any person who might have been made party defendant but when it appears that any of the parties served with process, or appearing in the proceedings, are guilty of the offense charged, judgment must be rendered against him. In case a defendant has become a subtenant of the premises in controversy after the service of the notice provided for by part two of section eleven hundred and sixty-one of this code, upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action. In case a married woman be a tenant, or a subtenant, her coverture shall constitute no defense, but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a personal judgment against her can only be enforced against property on the premises at the commencement of the action. All persons who enter the premises under the tenant, after the commencement of the suit, shall be bound

by the judgment, the same as if he or they had been made party to the action.

§ 1103.

Process, Pleadings, etc. Except as provided in the preceding section, the provisions of Part 2 of this Code, relating to parties to civil actions, are applicable to this proceeding.

§ 1104.

The plaintiff, in his complaint, which shall be verified, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force or violence which may have accompanied the alleged forcible entry or forcible or unlawful detainer charged; and claim damages therefor; in case the unlawful detainer charged is after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint, a summons must be issued thereon.

§ 1105.

Upon filing the complaint the plaintiff may, upon motion, have immediate possession of the premises by a writ of restitution issued by the court and directed to the sheriff of the county, or coroner or marshal, for execution, where it appears to the satisfaction of the court, after a hearing on the motion, from the verified complaint and from any affidavits which may be filed by or on behalf of the parties, that the defendant unlawfully or has no property right or interest in, or claim sufficient to sustain the interest or damages sought to be recovered by the plaintiff, or to the use of the state, as hereinafter provided, from the state, or against whom an allegation is found within the state, or [illegible] served by the service of summons. Written notice of the hearing on the motion must be served on the

defendant by the plaintiff in accordance with the provisions of Section 1011, and must inform the defendant that he may file affidavits on his behalf with the court and may appear and present testimony on his behalf, and that if he fails to appear the plaintiff will apply to the court for the writ of possession. The plaintiff shall file an undertaking with good and sufficient sureties, to be approved by the judge, in such sum as shall be fixed and determined by said judge, to the effect that if the plaintiff shall fail to recover judgment against the defendant for the possession of said premises, or if the suit be dismissed, that plaintiff will pay to defendant such damages, not to exceed the amount fixed in said undertaking, as may be sustained by the defendant by reason of such dispossession under said writ of possession. An action to recover such damages shall be commenced by the defendant in a court of competent jurisdiction within one year from the date of entry of dismissal or of final judgment in favor of the defendant.

§ 1167

The summons shall be in the form specified in Section 412.20 except that the defendant's time to respond to the complaint is three days after the summons is served upon him.

In all other respects the summons shall be issued and served and returned in the same manner as a summons in a civil action.

§ 1168

If the complaint presented establishes, to the satisfaction of the judge, fraud, force, or violence, in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant.

§ 1169

If at the time appointed any defendant served with summons does not appear and defend, the clerk or the judge if there be no clerk, upon application of the plaintiff, must enter the default of such defendant, or defendants, and thereafter the plaintiff may apply to the court for the relief demanded in the complaint, including the costs, against such defendant, or defendants, or against one or more of such defendants.

§ 1170

Defendant May Appear, Etc. On or before the day fixed for his appearance, the defendant may appear and answer or demur.

§ 1171

Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the Court in which the action is pending.

§ 1172

Showing Required of Plaintiff in Forcible Entry or Detainer. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

§ 1173

When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the Judge must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted upon account of such amendment unless the defendant, by affidavit filed, shows to the satisfaction of the Court good cause therefor.

§ 1174

If upon the trial, the verdict of the jury, or, if the case be tried without a jury, the findings of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceedings be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement if the notice required by Section 1161 of the code states the election of the landlord to declare the forfeiture thereof, but if such notice does not so state such election, the lease or agreement shall not be forfeited.

The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent.

Judgment against the defendant guilty of the forcible entry, or the forcible or unlawful detainer may be entered in the discretion of the court either for the amount of the damages and the rent found due, or for three times the amount so found.

When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the notice required by Section 1161 has not stated the election of the landlord to declare the forfeiture thereof, the court may, and, if the lease or agreement is in writing, is for a term of more than one year, and does not contain a forfeiture clause, shall order that execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate.

But if payment as here provided be not made within five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

A plaintiff, having obtained a writ of restitution of the premises pursuant to an action for unlawful detainer, shall be entitled to have the premises restored to him by officers charged with enforcement of such writs. The enforcing officer shall serve such writ promptly upon payment of

reasonable costs of service. If the tenant does not vacate the premises within five days from the date of service of such writ, the enforcing officer shall remove the tenant from the premises and place the plaintiff in possession thereof.

All goods, chattels or personal property of the tenant remaining on the premises at the time of its restitution to the plaintiff shall be restored by the plaintiff in a place of safekeeping for a period of 30 days and may be redeemed by the tenant upon payment of reasonable costs incurred by the plaintiff in providing such storage and the judgment rendered in favor of plaintiff, including costs. Plaintiff may, if he so elects, store such goods, chattels or personal property of the tenant on the premises, and the costs of storage in such case shall be the fair rental value of the premises for the term of storage. An inventory shall be made of all goods, chattels or personal property left on the premises prior to its removal and storage or storage on the premises. Such inventory shall either be made by the enforcing officer or shall be verified in writing by him. The enforcing officer shall be entitled to his costs in preparing or verifying such inventory.

In the event the property so held is not removed within 30 days, such property shall be deemed abandoned and may be sold at a public sale by competitive bidding, to be held at the place where the property is stored, after notice of the time and place of such sale has been given at least five days before the date of such sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Notice of the public sale may not be given more than five days prior to the expiration of the 30 days during which the property is to be held in storage. All money realized from the sale of such personal

property shall be used to pay the costs of the plaintiff in storing and selling such property, and any balance thereof shall be applied in payment of plaintiff's judgment, including costs. Any remaining balance shall be returned to the defendant.

§ 1176

An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge before whom the same was rendered so directs.

§ 1177

RULES OF PRACTICE. Except as otherwise provided in this Chapter the provisions of Part 2 of this Code are applicable to, and constitute the rules of practice in the proceedings mentioned in this Chapter.

§ 1178

The provisions of Part 2 of this Code, relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this chapter or with rules adopted by the Judicial Council apply to the proceedings mentioned mentioned in this chapter.

§ 1179

The Court may relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in case of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the Court, as provided in section one thousand one hundred and seventy-four. The application may be made by a tenant or sub-tenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application with a copy of the petition, must be served on

the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made.

§ 1179a

In all proceedings brought to recover the possession of real property pursuant to the provisions of this chapter all courts, wherein such actions are or may hereafter be pending, shall give such actions precedence over all other civil actions therein, except actions to which special precedence is given by law, in the matter of the setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined.

California Code of Civil Procedure

§ 440

When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other.

California Civil Code

§ 1941

The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine.

§ 1942

If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.

California Health and Safety Code

§ 17995

Any person who violates any of the provisions of this part of any rule or regulation promulgated thereto is guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars ($500) or by imprisonment not exceeding six months, or by both such fine and imprisonment.

Title 8, Calif. Administrative Code
Part 6, Substandard Buildings

17925. General. Any building or portion thereof including any dwelling unit, guest room, or suite of rooms, or the premises on which the same is located, in which there exists any of the following listed conditions to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants thereof, shall be deemed and hereby is declared to be a substandard building:

(a) Inadequate Sanitation, which shall include but not be limited to the following:

(1) Lack of, or improper water closet, lavatory, bathtub or shower in a dwelling unit

(2) Lack of, or improper water closets, lavatories, and bathtubs or showers per number of guests in a hotel

(3) Lack of, or improper kitchen sink

(4) Lack of hot and cold running water to plumbing fixtures in a hotel

(5) Lack of hot and cold running water to plumbing fixtures in a dwelling unit

(6) Lack of adequate heating facilities

(7) Lack or improper operation of required ventilation equipment

(8) Lack of minimum amounts of natural light and ventilation required by this article

(9) Room and space dimensions less than required by this article

(10) Lack of required electrical lighting

(11) Dampness of habitable rooms

(12) Infestation of insects, vermin, or rodents as determined by the enforcement agency

(13) General dilapidation or improper maintenance

(14) Lack of connection to required sewage disposal system

(15) Lack of adequate garbage and rubbish storage and removal facilities as determined by the enforcement agency

(16) Discharge of sewage on the surface of the ground

(17) Lack of an approved water supply

(b) Structural Hazards, which shall include but not be limited to the following:

(1) Deteriorated or inadequate foundations

(2) Defective or deteriorated flooring or floor supports

(3) Flooring or floor supports of insufficient size to carry imposed loads with safety

(4) Members of walls, partitions, or other vertical supports that split, lean, list, or buckle due to defective material or deterioration

(5) Members of walls, partitions, or other vertical supports that are of insufficient size to carry imposed loads with safety

(6) Members of ceilings, roofs, ceiling and roof supports or other horizontal members which sag, split, or buckle due to defective material or deterioration

(7) Members of ceilings, roofs, ceiling and roof supports, or other horizontal members that are of insufficient size to carry imposed loads with safety

(8) Fireplaces or chimneys which list, bulge, or settle, due to defective material or deterioration

(9) Fireplaces or chimneys which are of insufficient size or strength to carry imposed loads with safety

(10) Cesspools and septic tanks which are structurally unsound.

(c) Nuisance. Any nuisance as defined in this article.

(d) Hazardous Wiring. All wiring except that which conformed with all applicable laws in effect at the time of installation and which has been maintained in good condition and is being used in a safe manner.

(e) Hazardous Plumbing. All plumbing except that which conformed with all applicable laws in effect at the time of installation and which has been maintained in good condition and which is free of cross connections and siphonage between fixtures.

(f) Hazardous Mechanical Equipment. All mechanical equipment, including vents, except that which conformed with all applicable laws in effect at the time of installation and which has been maintained in good and safe condition.

(g) Faulty Weather Protection, which shall include but not be limited to the following:

(1) Deteriorated, crumbling, or loose plaster.

(2) Deteriorated or ineffective waterproofing of exterior walls, roof, foundations, or floors, including broken windows or doors

(3) Defective or lack of weather protection for exterior wall coverings, including lack of paint, or weathering due to lack of paint or other approved protective covering

(4) Broken, rotted, split, or buckled exterior wall coverings or roof coverings

(h) Fire Hazard. Any building or portion thereof, device, apparatus, equipment, combustible waste, or vegetation which in the opinion of the enforcement agency is in such a condition as to cause a fire or explosion or provide a ready fuel to augment the spread and intensity of fire or explosion arising from any cause.

(i) Faulty Materials of Construction. All materials of construction except those which are specifically allowed or approved by this article, and which have been adequately maintained in good and safe condition.

(j) Hazardous or Unsanitary Premises. Those premises on which an accumulation of weeds, vegetation, junk, dead organic matter, debris, garbage, offal, rat harborages, stagnant water, combustible materials, and similar materials or conditions constitute fire, health, or safety hazards.

(k) Inadequate Maintenance. Any building or portion thereof which is determined to be an unsafe building in accordance with this article.

(l) Inadequate Exits. All buildings or portions thereof not provided with adequate exit facilities as required by this article except those buildings or portions thereof whose exit facilities conformed with all applicable laws at the time of their construction and which have been adequately maintained and increased in relation to any increase in occupant load, alteration or addition, or any change in occupancy.

When an unsafe condition exists through lack of, or improper location, of exits, additional exits may be required to be installed.

(m) Inadequate Fire-Protection or Fire-Fighting Equipment. All buildings or portions thereof which are not provided with the fire-resistive construction or fire-extinguishing systems or equipment required by this article, except those buildings or portions thereof which conformed with all applicable laws at the time of their construction and whose fire-resistive integrity and fire-extinguishing systems or equipment have been adequately maintained and improved in relation to any increase in occupant load, alteration or addition, or any change in occupancy.

(n) Improper Occupancy. All buildings or portions thereof occupied for living, sleeping, cooking or dining purposes which were not designed or intended to be used for such occupancies.

17926. Procedures. Any building or portion thereof found to be substandard as defined in this part shall be repaired, rehabilitated, demolished, or removed in accordance with the Health and Safety Code, Division 13, Part 1.5 and this article.

Michigan Comp. Laws

§ 600.5637

* * * * * * *

(4) The plaintiff may allege in the complaint that defendant is indebted to him for breach of the lease or land contract or by reason of wrongful possession of the premises for which possession is sought in the complaint. A money judgment may be rendered in such action against any defendant over whom the court has personal jurisdiction. A defendant against whom a claim is made may file a counterclaim against the plaintiff by way of setoff or recoupment. If the claim for money or counterclaim exceeds the jurisdiction of the court, the court shall hear the claim for possession but shall dismiss the claim for money and counterclaim without prejudice to subsequent action thereon.

(5) Upon proper motion for summary judgment on the pleadings, either party may obtain judgment on the claim for possession. The motion shall be determined independently without prejudice to any other claims or counterclaim. For the purpose of this paragraph a claim for possession for nonpayment of rent is deemed to include, without limitation, the following issues:

(a) That the defendant has paid the rent due.

(b) That the plaintiff has committed a breach of the lease which excuses the payment of rent.

* * * * * * *

McKinney's Cons. Laws of New York Ann.

§ 49.5-732

If the appropriate appellate division shall so provide in the rules of a particular court, this section shall be applicable in such court in a proceeding brought on the ground that the respondent has defaulted in the payment of rent;

in such event, all other provisions of this article shall remain applicable in such proceeding, except to the extent inconsistent with the provisions of this section.

1. The notice of petition shall be returnable before the clerk, and shall be made returnable within five days after its service.

2. If the respondent answers, the clerk shall fix a date for trial or hearing not less than nor more than eight days after joinder of issue, and shall immediately notify by mail the parties of their attorneys of such date. If the determination be for the petitioner, the issuance of a warrant shall not be stayed for more than five days from such determination.

3. If the respondent fails to answer within five days from the date of service, as shown by the affidavit or certificate of service of the notice of petition and petition, the judge shall render judgment in favor of the petitioner and may stay the issuance of the warrant for a period of not to exceed ten days from the date of service.

4. The notice of petition shall advise the respondent of the requirements of subdivisions 1, 2 and 3, above.

§ 49.5-743

Except as provided in section 732, relating to a proceeding for non-payment of rent, at the time when the petition is to be heard, the respondent, or any person in possession or claiming possession of the premises, may answer, orally or in writing. If the answer is oral the substance thereof shall be indorsed upon the petition. If the notice of petition was served at least eight days before the time at which it was noticed to be heard and it so demands, the answer shall be made at least three days before the time the petition is noticed to be heard, and, if in writing, it shall be served within such time; whereupon any reply shall be

served at least one day before such time. The answer may contain any legal or equitable defense, or counterclaim. The court may render affirmative judgment for the amount found due on the counterclaim.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1385

REGINALD HUTCHERSON, et al., *Appellants,*

vs.

LAURIE LEHTIN, et al. *Appellees.*

On Appeals from the United States District Court for the Northern District of California

Motion of Appellee Laurie Lehtin to Dismiss or Affirm

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1385

REGINALD HUTCHERSON, et al., *Appellants,*

vs.

LAURIE LEHTIN, et al. *Appellees.*

On Appeals from the United States District Court for the Northern District of California

Motion of Appellee Laurie Lehtin to Dismiss or Affirm

Appellants have taken separate appeals from an order of a three-judge district court denying a preliminary injunction and from a later final judgment declaring that the California unlawful detainer statute is valid and constitutional in respects assailed by appellants.

Appellee Laurie Lehtin hereby moves the Court to dismiss the appeals or to affirm on the following several grounds: (1) The controversy is moot. (2) Jurisdiction was lacking in the court below. (3) Jurisdiction to hear this appeal is lacking. (4) In any event, the order and judgment appealed from are plainly right and should be summarily affirmed because the questions presented are so unsubstantial as not to need further argument.

assert in the unlawful detainer proceedings. Because the proposed defenses and counterclaims are not permitted in a California unlawful detainer action, which is a special proceeding, prohibition was denied. No appeal to higher California courts was taken from the denial. At the trial in the Municipal Court, evidence of failure to repair the premises was rejected on the same ground, and, as default in payment of rent was not contested, judgment was entered that the landlord was entitled to possession and for the unpaid rent.

Without appealing from this judgment to a higher state court, as they had a right to do, and while the time for an appeal was still open, appellants filed this action in the United States District Court to enjoin enforcement of the state court judgment and for a declaration that the California unlawful detainer statute violates the 14th Amendment as preventing "tenants of substandard dwellings from raising defenses and counterclaims relating to and arising out of the condition of their dwellings."[3] Although the complaint alleged that appellants sued on behalf of all California tenants living in "substandard dwellings," no action was taken as provided and required by F.R.Civ.Proc. Rule 23 to determine that the action might be maintained as a class action.

The court below issued a temporary restraining order against enforcement of the state court judgments, and no steps have ever been taken to enforce them. A three-judge court was convened, and appellants applied for a preliminary injunction. Before the court heard the application for a preliminary injunction, *five of the six appellants voluntarily vacated the premises.*

Appellee filed a written suggestion that the court lacked jurisdiction and a motion to dismiss. After hearing the several motions, the three-judge court, by-passing appellee's contention of lack of jurisdiction, denied the application for a preliminary injunction. Treating appellee's motion to dismiss as one for summary judg-

3. Compl., prayer, paras. 3, 4, p. 5.

ment, the court granted it as to all issues except one. That issue related to appellants' claim that the unlawful detainer suit was in retaliation for complaints to public authorities over the condition of their apartments. Appellants later abandoned the contention of retaliation, and, when this was called to the court's attention, final judgment of dismissal was entered.[4]

The sole issue left in the court below was whether California procedure violates (a) the due process clause or (b) the equal protection clause of the 14th amendment in not permitting in the special proceeding of unlawful detainer affirmative defenses of breach by the landlord of a covenant to repair or of dilapidation, disrepair or non-conformity of premises with municipal codes. No issues of fact were presented by appellants.[5] Concededly, California law does not permit these claims as defenses in an unlawful detainer proceeding but permits them to be asserted in a separate action.

A week after the three-judge court denied the preliminary injunction and about one month before entry of the final judgment, *the sixth appellant voluntarily vacated the premises, as the other five had previously done* (Hoogs Aff., para. 4). Thus the Municipal Court judgment for possession was never enforced and never need be.

ARGUMENT

I. The Case Is Moot.

The appeals from the denial of a preliminary injunction against the landlord's enforcing his judgments for possession are plainly

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4. Appellant's Jurisdictional Statement informs this Court that it does not bring the issue of retaliation here (p. 4, fn. 3).

5. We do not believe that the Jurisdictional Statement (at p. 9) intends to suggest that there were factual questions, because such a claim would be in defiance of the record. Not only was the whole record on the issue in the Municipal Court before the District Court, but the latter offered appellants the opportunity to present any further facts and appellants did not accept the opportunity. F.R.Civ.P. Rule 56(e) provides how the existence of issues of fact, sufficient to defeat a motion for judgment, is to be shown, by affidavit. The court below advised appellants, "You have a right to file affidavits here" (R.Tr. 76), but none was tendered.

moot. Five of the six appellants voluntarily relinquished possession before the application for a preliminary injunction was heard, and the sixth voluntarily did so before final judgment was entered below. The single office of a preliminary injunction is to preserve the *status quo* pending trial. With appellants voluntarily vacating the premises, no *status quo ante* remained to be preserved, there was nothing to which to direct a permanent injunction, and there is no subject matter on which a judgment of this Court could operate. *Brownlow v. Schwartz,* 261 U.S. 216 (1923); *Oil Workers Unions v. Missouri,* 361 U.S. 363 (1960).

The case is also moot with respect to the request for a declaratory judgment of unconstitutionality. With appellants' voluntary vacation of the premises, what remained was a law professor's request for an advisory opinion about constitutionality of state law. In *Oil Workers Unions v. Missouri,* supra, public utility employees struck in violation of a Missouri statute, a state court enjoined the strike, the strike terminated, a new labor contract was made, and the injunction expired according to its terms. This Court declined to consider the claim that the Missouri statute was unconstitutional, saying (pp. 367-368):

> "* * * the duty of this Court 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' [citations] To express an opinion upon the merits of the appellants' contentions would be to ignore this basic limitation upon the duty and function of the Court, and disregard principles of judicial administration long established and repeatedly followed."

These appeals are not saved by a claim that the case is a "class action" on behalf of all California tenants living in allegedly "substandard" housing, for three separate reasons: (1) It is not a class action. Under new F.R.Civ.P. Rule 23(c), an action be-

comes a class action only if and when the court determines after hearing and on findings that it shall be so maintained. Appellants never brought the matter on for any such determination, and there was none. (2) There is no actual controvery shown to exist respecting the unidentified members of the "class"; the action would be simply a request for an advisory opinion. (3) The absence of any controversy affecting appellants deprives *them* of the right to represent such class if its exists.[6]

II. Jurisdiction Was Lacking.

A. Lack of jurisdiction of this appeal.

This Court's jurisdiction to hear a direct appeal from a three-judge court is conferred by 28 U.S.C. § 1253. It is confined to an appeal from an order granting or denying an injunction. Here the appeal from the order denying an injunction is moot, as just seen. What is left is an appeal from the judgment granting a declaration of constitutionality after any injunctive relief was moot. That is not appealable. *Goldstein v. Cox*, 396 U.S. 471 (1970) is directly in point. Attacking constitutionality of a New York statute, appellants' complaint there prayed for a preliminary injunction against enforcement of the statute, but they moved for a summary judgment that the statute was unconstitutional without explicitly applying for injunctive relief. This Court dismissed an appeal from an order denying summary judgment for lack of jurisdiction. Said it (p. 478):

> "This Court has more than once stated its jurisdiction under the Three Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.' "

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6. *Carroll* v. *Associated Musicians of Greater New York*, 316 F.2d 574 (2 Cir.); *Sciulli* v. *Tronzo*, 304 F.Supp. 1142 (W.D. Pa., October 9, 1969)

B. Lack of jurisdiction below.

The issues appellants raised below and seek to raise here relate to constitutionality of a state statute as applied in the state court. Those issues not only could be raised in the state court. *They in fact were,* both in the unlawful detainer proceeding in the Municipal Court[7] and in the prohibition proceedings in the California Superior Court. From the adverse decisions in the state courts appellants could have appealed to a higher California Court (C.C.P. § 17. If in such an appeal the highest state court held against them, they could come here by direct appeal under 28 U.S.C. § 1257(2). That was the route that had to be pursued. No "lateral appeal" to a lower federal court is authorized, whatever the form of application to such a court. This Court has frequently so held. *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *England v. Medical Examiners,* 375 U.S. 411 (1964); and see *Angel v. Bullington,* 330 U.S. 183, 189 et seq (1947).

As said in *Rooker* (263 U.S. at 415, 416):

> "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. [citations omitted] Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. [citation omitted] To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original."

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7. By the Ninth and Twelfth Affirmative Defenses in the Answers in the Municipal Court. See Affidavit of William R. Petrocelli, Ex. C. In the court below appellants correctly represented these two defenses in the Municipal Court as raising the constitutional claims asserted here (R. Tr. 29, 30).

To the same effect are *Brown v. Chastain,* 416 F.2d 1032 (5 Cir. 1969); *Gately v. Sutton,* 310 F.2d 1027 (10 Cir. 1962); *Ash v. Northern Ill. Gas Co.,* 362 F.2d 148 (7 Cir. 1966).

III. The Order and Judgment Appealed from Are Plainly Right, and the Constitutional Questions Are Not Substantial.

Nothing in the text of the California unlawful detainer statute was claimed by appellants to be unconstitutional (R.Tr. 37). The claim is that the statute as construed by the courts is unconstitutional in that neither (1) failure of a landlord to perform an express or implied covenant to repair nor (2) maintenance by a landlord of rental premises not conforming with municipal codes is a defense in unlawful detainer proceedings for non-paymnt of rent.[8] The unlawful detainer statute is so applied by California courts.

California's unlawful detainer proceeding is a special proceeding. The statute provides for a three-day notice to pay rent or quit before suit may be filed (C.C.P. § 1162).[9] After suit is filed a summons issues to answer in three days (C.C.P. § 1167). C.C.P. § 1178 provides for an appeal. C.C.P. § 1179 permits a defendant within thirty days after entry of the judgment to petition the Municipal Court itself for an order relieving him from deprivation of his tenancy and restoring him to possession upon payment of rent past due. No such application was made by any appellant here.

The policy underlying the statute was explained by Justice Roger Traynor, later the distinguished Chief Justice of California, in

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8. There is no claim that appellants are victims of racial discrimination. In the prohibition proceedings in the California Superior Court, the court asked appellants' counsel to state whether he claimed that the detainer cases were brought because of appellants' race, a fact which California recognizes as an absolute defense in an unlawful detainer proceeding, *Abstract Investment Co. v. Hutchinson,* 204 C.A.2d 242, 22 Cal. Reptr. 309. Counsel replied that appellants made no claim of discrimination against them based on race. Exhibit B to Affidavit of William R. Petrocelli.

9. "C.C.P." refers to the California Code of Civil Procedure. The unlawful detainer statute is contained in §§ 1161, et seq. and is set forth in the Appendix B to Appellants' Jurisdictional Statement.

Jordan v. Talbot, 55 Cal.2d 597, 361 P.2d 488 (1961). It is to eliminate "any claim that self-help is necessary" and "to prevent bloodshed, violence and breaches of the peace too likely to result from wrongful entries into the possessions of others" (55 Cal.2d at 607). The expeditious nature of California's detainer procedure has been repeatedly upheld as necessary for a wise determination of the right to possession of rental property as between the owner and a tenant who cannot or will not pay rent. In 1928 in *Telegraph Ave. Corp. v. Raentsch,* 205 Cal. 93, 269 P.2d 1109, the California Supreme Court held that no counterclaims were permitted in an unlawful detainer action. Rejecting a contention that this was a denial of equal protection, it said (pp. 97, 98) that the legislative distinction between detainer actions and other civil cases in which all claims between the parties can be tried out at one time was "natural and reasonable" in view of the need "for a quick and ready determination" of the right to possession of rental property as contrasted with the different considerations pertinent to "ordinary cases at law or in equity".

This does not mean that the tenant is denied access to court for any grievance against his landlord. California gives him right to a full judicial trial of *any* grievance whatever respecting the condition of rented premises.[10] California law says only that where a tenant pays no rent he cannot assert the condition of his premises as a defense in the *unlawful detainer action.* He must litigate such claims in a separate action, unless he chooses to surrender possession, *Knowles v. Robinson,* 60 Cal.2d 620, 387 P.2d 383 (1963), in which event cross-claims are permitted as in any other civil proceeding.

California has provided a complete and fair scheme of substantive rights and obligations as between landlord and tenant and a series of procedures for their enforcement. C.C.P. § 1941 requires the landlord to maintain premises rented for human hab-

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10. Appellants' Jurisdictional Statement cites numerous California decisions to this effect (p. 18, fns. 26, 27, 28).

itation in a manner fit for the purpose. A tenant, dissatisfied with the conditions of his premises, has several remedies, all of which appellants eschewed: (1) He may continue to pay rent, continue to occupy the premises, and sue the landlord for damages.[11] (2) If the premises are unfit for habitation, he may withhold up to a month's rent, make repairs himself, and apply the withheld rent, C.C.P. 1942, or he may vacate without liability for further rent. (3) He may surrender possession after the landlord sues in unlawful detainer and counterclaim for damages.[12] (4) He may litigate the unlawful detainer action and, if judgment goes against him, he may apply within thirty days of judgment for relief upon payment of rent, C.C.P. 1179. (5) Or he may litigate the unlawful detainer action and either concurrently or later, as he will, file suit in the same or any other court of venue for all his claims of damages. No constitutional right is denied by providing that a claim must be filed as a complaint in a separate action instead of as a counterclaim. Procedural choices like this are left for each state to make.

The situation in California is entirely different from that involved in *Shanks v. Georgia*, No. 266, October Term 1969, on appeal from the Georgia Supreme Court in *Georgia v. Shanks*, 225 Ga. 88, 166 S.E.2d 19 (1969). That appeal involved a challenge to Georgia's "summary disposses procedure" (Ga. Code §§ 61-303 et seq.) which requires a tenant allegedly owing rent to post a bond for double the rent claimed as a condition to the right to defend at all. A commentator has recently contrasted the Georgia and California detainer procedures and concluded that California's provides fairly "for all of the normal incidents of a civil proceeding."[13]

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11. Authorities cited, Juris. St., p. 18, fns. 26 and 27.

12. *Knowles* v. *Robinson*, supra.

13. Comment, "Poverty and Equal Access to the Courts: The Constitutionality of Summary Disposses in Georgia", 20 Stanford L.Rev. 766, 776 (April 1968).

Appellants' claim is not really that there is any lack of procedural due process. The citations in their Jurisdictional Statement on the kind of hearing required by due process in various situations[14] are far afield because California law *does* entitle a tenant to a full judicial hearing of any and every dispute with his landlord. No decision has ever suggested that the hearing of all grievances must be in the unlawful detainer proceeding, rather than in another suit. Similarly, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, and *Wheeler v. Montgomery*, ... U.S. ....., 38 U.S.L.W. 4231 (March 23, 1970), are not in point here. *Sniadach* held that a debtor's wages cannot be garnished without first giving him a hearing. *Wheeler* held that a recipient of welfare benefits must be accorded an administrative hearing, fair in nature, before payments are terminated. Here there was a plenary trial before any judgment was rendered in the Municipal Court.

Appellants' real claim is that the 14th Amendment imposes on California a substantive rule of law in the field of landlord and tenant different from that selected by the California legislature. The claim is that a tenant has a federal constitutional right to occupy premises and refuse to pay rent until the landlord makes repairs to the tenant's satisfaction or a court determines that claimed untenantable conditions do not exist after what might be a prolonged delay. Such rule of law would probably drive from the rental housing market owners presently striving against difficult odds to meet the needs of that market. As stated by a recent commentator in "Rent Withholding and the Improvement of Substandard Housing," 53 Cal.L.Rev. 304, 336:

> "Substandard buildings are usually old, and they can be repaired and maintained according to ever rising standards for only so long. Eventually they must be torn down and replaced with new housing adapted to the needs of low income facilities. Neither rent strikes nor any other means of housing law enforcement can bring this about directly."

14. E.g., Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 163; *Holt* v. *Virginia*, 381 U.S. 131.

But these are questions of policy, not constitutional law. The problems inherent in low income urban housing need the kind of study best available from legislative bodies or administrative agencies. By pointing to Michigan and New York statutes as being preferable to California law, and by praising a "Model Residential Landlord-Tenant Code" issued as a tentative draft by the American Bar Foundation,[15] appellants give testimony that the questions are legislative, not constitutional. They recognize the chaos which would be created by the rule of law which they argue the Constitution requires, and they offer their own legislative suggestions for amelioration of that chaos, by suggesting that "the legislature might limit the time for discovery and preparation" of the lawful detainer case, limit issues and claims to the amount of rent past due, provide for deposit in court of rent, and the like.[16] All this, again, is testimony that the questions are legislative, not constitutional.

We submit that the appellants' claims lack any merit.

CONCLUSION

We respectfully submit that the motion to dismiss should be granted for lack of jurisdiction or mootness or both, and that, if the Court should believe that there is any remaining "case or controversy" over which there is jurisdiction, the appeal should be dismissed or the order and judgment should be affirmed, without further briefing or argument, for lack of any substantial federal question.

Dated: San Francisco, California, May 1, 1970.

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15. Juris. St., pp. 14, 15.
16. Juris. St. p. 15.

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REGINOLD HUTCHERSON, et al., *Appellants,*

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Appellants' Reply Brief

On Appeal from the United States District Court for the Northern District of California

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REGINOLD HUTCHINSON, et al.,	*Appellants,*
vs.	
LAURIE LEHTIN, et al.,	*Appellees.*

Appellants' Reply Brief

On Appeal from the United States District Court for the Northern District of California

Appellants in this brief reply to the contentions raised by the appellees in their motion to dismiss or affirm. Appellants' principal contentions in support of the jurisdiction of this Court and in support of the importance and substantially of the questions raised in this appeal are contained in their jurisdictional statement. The Court is respectfully referred to the jurisdictional statement for appellants' argument in this regard.

ARGUMENT

I. The case is not moot.

A. THE APPELLANTS HAVE NOT ABANDONED THEIR RIGHTS.

Appellees contend that the appellants have abandoned their rights and that the case is therefore moot. This contention is demonstrably incorrect.

Appellants have not voluntarily abandoned their dwellings. Although the appellants have now been evicted, in each case they did so only because a five-day notice had been issued by the Sheriff pursuant to C.C.P. § 1174[1] and eviction was imminent.[2] Some of the appellants were forced to move because of the uncertainty that a restraining order would be issued by the U.S. District Court restraining the Sheriff from evicting them. The other appellants moved only after the restraining order of the U.S. District Court was later dissolved. In each case the appellants relinquished their dwellings pursuant to a direct order of the Sheriff. This can hardly be considered a "voluntary" abandonment.

More importantly, this action is not moot because the appellants also seek injunctive relief against enforcement of the money judgments entered against them in the unlawful detainer proceedings. The complaint in the district court action clearly calls for such relief. There is nothing to indicate that the injunctive relief is moot with respect to this issue.

1 "C.C.P." refers to the California Code of Civil Procedure.

2 Appellees' statement that "no steps have ever been taken" to enforce the unlawful detainer judgments, (appellees' motion P. 4) is not correct. The appellees caused writs of execution to be issued, costs to be advanced to the Sheriff and five-day notices to be served on appellants pursuant to C.C.P. § 1174. The appellees have garnished the bank account of two appellants and have threatened other appellants with garnishment.

B. THE DECLARATORY RELIEF IS NOT MOOT.

The declaratory relief sought by the appellants on behalf of themselves and the class is properly before this Court. This issue is not moot.

Appellees contend that this is not a class action. However, this contention ignores the first five words of the district court opinion: "This is a class action . . ." This ruling is part of an order issued by the three-judge district court at its first sitting to hear appellants' motion for a preliminary injunction. Hence, the determination that this is a class action was made "as soon as practicable after the commencement of an action." Rule 23(c)(1). Moreover, it cannot be argued that appellees were in any way prejudiced by the failure of the court to make this determination prior to the hearing on appellants' motion. Appellants' motion was for a preliminary injunction that would only affect the named plaintiffs.[3] No relief on behalf of the class was sought at the hearing. Hence, the appellees could not have been prejudiced by the fact that the determination of a class action was made simultaneously—rather than prior to—the ruling of the court denying appellants' motion and granting summary judgment to the appellees.

The declaratory relief sought is in no way moot. There has been no acquiescence by the appellees, no change in the law, etc. that would end the continuing nature of the controversy. Appellees candidly concede that the California unlawful detainer law continues to exclude affirmative de-

3 There was no motion to dismiss by the appellees before the district court at that time. Both the appellees' brief (p. 4) and the district court opinion (Juris. St., Appendix A 10) are wrong in this regard. Appellees only filed a "suggestion that the Court lacked jurisdiction." No motion or notice of motion was filed. Hence, both the determination of the class and the granting of summary judgment were done on the court's own motion.

fenses and counterclaims from the hearing provided under the law.[4] In point of fact the district court has granted declaratory relief in this action. This declaratory relief incorrectly states that the California unlawful detainer law "is valid and constitutional as against the contrary claims of plaintiffs . . ."[5] This opinion will continue to stand until reversed by this Court.[6]

II. Jurisdiction is not lacking.

A. THIS COURT HAS JURISDICTION ON APPEAL.

Appellees contend that this Court lacks jurisdiction on appeal, and they base their argument on *Goldstein v. Cox*, 396 U.S. 471 (1970). However, *Goldstein* is totally different from this case. In *Goldstein*, the appellants appealed from the *denial* of a motion for summary judgment. This Court held that such denial did not constitute the denial of injunctive relief. Implicit in that decision was the assumption that the appellants could still seek the injunctive relief prayed for in the district court. If such relief was denied, they were not precluded from direct appeal to this Court. In this case, however, the appellants seek to appeal the *granting* of a motion for summary judgment. Clearly, the granting of such a motion is a final judgment that precludes further proceedings in the district court. Summary judgment in this instance constitutes an order denying injunctive

4. Appellees' motion, p. 5.

There can be little doubt that this is a correct statement of California law. This is borne out by a recent case, *Union Oil Co. v. Chandler*, 4 Cal. App. 3d 716, __ Cal. Rptr. __ (Hearing denied by California Supreme Court, April 22, 1970).

5. Juris St., Appendix A 12.

6. If the appellees were correct in their contention that the action was moot, a motion to affirm or dismiss would not be proper. The granting of such a motion would merely leave standing an incorrect declaration of the law. This incorrect statement of the law should be disposed of by remanding it for a correct decision.

relief, and it is therefore appealable to this Court. Title 28 U.S.C. § 1253.

Since the denial of injunctive relief is appealable to this Court, the appeal from an adverse decision on declaratory relief is also properly before this Court as part of the same appeal. *Zemel v. Rusk*, 381 U.S. 1; *United States v. Georgia Public Service Commission*, 371 U.S. 285; *Paul v. United States*, 371 U.S. 245.

B. THE DISTRICT COURT HAD JURISDICTION IN THE MATTER.

The appellees claim that the district court lacked jurisdiction, and they base their contention on *Rooker v. Fidelity Trust Co.*, 263 U.S. 413; *Angel v. Bullington*, 330 U.S. 183; and *England v. Medical Examiners*, 375 U.S. 411. These cases are totally inapplicable to the case at hand.

In *Rooker*, the plaintiffs sought a bill in equity to overturn a state judgment that allegedly involved judicial misconduct. That case differed from the present case in at least four significant respects:

1. *Rooker* was concerned with isolated misconduct by one judge. This case concerns a denial of due process and a denial of equal protection growing out of a uniform application of a state law on a statewide basis.

2. *Rooker* involved a relitigation of the same case that had previously been heard by all of the state appellate courts and that had been previously disposed of on appeal by this Court. This case involves issues of procedural due process and a denial of equal protection of the laws that were not previously litigated.[7]

[7] Appellees' contention that these issues were raised in the California criminal detainer proceedings is clearly wrong. The issues that appellees refer to (Appellees' motion, p. 8, fn. 7) were substantive affirmative defenses based on constitutional grounds, i.e., racial discrimination in providing maintenance services to the

3. *Rooker* involved the same parties as in the previous state action. This case involves more than the original parties to the unlawful detainer actions. On one side of the dispute is the class of low-income tenants of substandard dwellings; on the other is the Sheriff and certain judicial officers. None of these persons was a party to the state court proceedings. The addition of these parties is not incidental: the central issue in this case is that the denial of a fair hearing under the California unlawful detainer law denies due process of law and equal protection of the laws to appellants *as a class*. In evaluating appellants' claims, the facts relating to the class must be considered.[8]

4. In *Rooker*, the plaintiffs' claims were fully reviewed on appeal under a procedure that protected their rights pending such appeal. No such appellate procedure was available to the appellants in this case. In each case the appellants who were parties to the California unlawful detainer proceedings sought stays of execution pending an appeal. In each case they were denied by the trial judge. Under the special appellate rules of the California unlawful detainer law no other court could thereafter grant a stay of execution pend-

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apartment (ninth affirmative defense) and denial of right to petition government for redress of grievances (twelfth affirmative defense). These issues can in no way be equated with the constitutional claim in this action that the *procedure* under California unlawful detainer law constitutes the denial of a fair hearing. This is a new claim that was in no way litigated in the state courts.

[8] See Juris St., p. 5-7, 9, 16-23.

Appellees' contention that there are no issues of fact is without merit. The factual issues pertaining to the class were never presented to the district court because that court granted summary judgment on its own motion prior to a trial on these issues.

ing an appeal.[9] Thus, if the appellants had elected to seek review of their constitutional claims through the state courts, they would have been forced to abandon the rights they were seeking to protect. When constitutional claims are at issue, the litigant cannot be compelled to abandon the rights he seeks to protect prior to invoking the jurisdiction of the federal courts.[10]

Angel v. Bullington, supra, is no closer to the point. In *Angel*, the plaintiffs attempted to litigate the exact same suit in the federal courts as had previously been litigated in the state courts. There was no claim that the state appellate review procedures could not, and did not, protect the plaintiffs' rights on appeal.[11]

England v. Medical Examiners refutes the point that appellees have attempted to raise. The Court clearly states that "[T]he right of a party plaintiff to choose a federal court where there is a choice cannot be denied." The Court then states that if a party "freely and without reservation" submits his federal claims for decision in the state court, "litigates them there, and has them decided there" he cannot relitigate the matter in the federal courts. It can hardly be contended that the named appellants, who were *defendants* in the state unlawful detainer proceedings, freely submitted to state court adjudication the constitutional issues raised in this class action.

9. C.C.P. § 1176; *Mendoza v. Small Claims Court of Los Angeles Judicial District*, 49 Cal.2d 668, 321 P.2d 9 (1958) (and cases cited therein).

10. *Dombrowski v. Pfister*, 380 U.S. 479.

11. The constitutional questions in *Angel* were not substantial. This is borne out by the fact that federal jurisdiction in that case was founded not on the civil rights statute but on diversity jurisdiction.

The remaining cases cited by appellees are routine applications of the *Rooker* doctrine. None of them supports the contention that jurisdiction was lacking in the district court.[6]

III. The constitutional questions are substantial.

Appellants do not believe that appellees have raised any points concerning the merits of their claims that have not been fully refuted in appellants' jurisdictional statement. The Court is respectfully referred to the jurisdictional statement for those arguments.

One point, however, warrants comment. Appellees cite *Jordan v. Talbot*, 55 Cal.2d 597, 361 P.2d 488 (1961) as supportive of their position. The thrust of their argument seems to be that if tenants obtain a fair hearing in unlawful detainer proceedings landlords will commit acts of "blood, sweat, violence and breaches of the peace" to recover the leased premises. Appellants are not contemplating that landlords are prone to violence, and it seems surprising that the appellees should do so. In any event, this hardly seems a proper justification for denying a fair hearing to appellants and other low income tenants of subsidized housing.

[illegible] appellees make [illegible] considerations that the district court lacked jurisdiction [illegible] to affirm or dismiss would be proper. The district court has entered declaratory relief [illegible] appellants [illegible] Appellees suggested relief would have [illegible] in effect to [illegible] a case, the proper relief would be to remand the matter to the district court for proceedings consistent with its jurisdiction.

CONCLUSION

Appellants urge this Court to take precautions [illegible] and the matter for further hearing.

Dated: May 7, 1970

Respectfully submitted,

[illegible]

[illegible]

[illegible]

[illegible]

Office-Supreme Court, U.S.
FILED
MAY 14 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1385

Reply Brief in Support of Motion of Appellee [illegible] to Dismiss or Affirm

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1385

RICHARD HONEYMAN, ET AL., *Appellants*,

v.

LAURIE LEHTIN, ET AL., *Appellees*.

On Appeals from the United States District Court for the Northern District of California

Reply Brief in Support of Motion of Appellee Laurie Lehtin to Dismiss or Affirm

denial of an injunction. But any denial of an injunction against termination of possession is moot because all appellants had vacated the premises before the judgment.

Moreover, the issue of declaratory relief was moot because appellants, having vacated the premises, no longer had a controversy with the landlord giving them a standing to obtain an abstract declaration about constitutionality of California legislation.

With respect to mootness appellants also assert that they did not voluntarily vacate but did so in anticipation of enforcement of the Municipal Court judgments for possession. To this there are two answers. First, voluntariness is irrelevant to mootness. Whatever the reason for vacating, there was nothing left upon which an injunction could thereafter operate. [Richardson v. McChesney, 218 U.S. 487, 488 (1910).]* Second, the statement about voluntariness is neither correct nor supported by the record. The Affidavit in Support of Temporary Restraining Order filed by appellants in the court below the very day the restraining order issued recites (¶ 5): "These plaintiffs are presently without any way to prevent such evictions within the California courts" (this was a representation under oath that they were still in possession and that possession was protected by the restraining order until the preliminary injunction was denied, by which time the appellants had vacated).

Appellants also seek to avoid mootness by arguing that appellants sought an injunction not only against enforcement of the judgment for possession but also against enforcement of the money judgments for unpaid back rents. Granted, etc. No one

*[Footnote illegible. It appears that the person was enjoined by the Superior Court from doing certain things, which he believed it was necessary upon to comply with the judgment of the Court of Appeals and avoid even the appearance of disobedience of. The nature of the effort to do this [illegible] is not mentioned. We are informed only that the [illegible] was finally dismissed by the trial court.]

of obligation to pay back rent, as presented below. The order to show cause presented by appellants to the court below in their application for a preliminary injunction said nothing about unpaid rent; it merely directed that appellee should show cause why a preliminary injunction should not be issued, enjoining defendants Lange, Lehtio and Frank O. Madigan from evicting the named plaintiffs and why the declaratory relief prayed for in the complaint should not be granted. The temporary restraining order issued below did not restrain appellee from enforcing the money judgments; it restrained them from evicting the above-named plaintiffs until such time as this complaint for a preliminary and permanent injunction is heard and determined by a three-judge district court. And it is understandable why appellants did not seek below to raise any constitutional question about the judgments to pay unpaid rent. Any contention that the Fourteenth Amendment confers rent-free tenure for a tenant in the event of a dispute over repair or maintenance would be [illegible] frivolous.

Appellants assert (Reply Br. 2-3) that the record in the present case shows that "this is a class action" and should be viewed [illegible] as a determination under F.R.C.P. Rule 23 that it may be maintained as a class action. We need not pause over appellants' erroneous statement because it is [illegible] in this respect.

Appellants' motion was for a preliminary injunction that would only affect the named plaintiffs. No relief on behalf of the class was sought at the hearing. No other tenants [illegible] sought relief on behalf of a class and there was no jurisdiction to treat a direct appeal as a motion to dismiss an appeal.

With respect to lack of jurisdiction of the court below to [illegible] [illegible] appeal from the state court [illegible]

tional issues were not present in the state cases is, crystal[illegible]. The constitutional issue is whether refusal of the state court to hear certain defenses violated the Fourteenth Amendment. Appellants urged the state court to hear the defenses upon constitutional grounds. That issue was available for presentation in the state courts, both in the court of first instance and on appeal through the state hierarchy, and then to this Court. Whether phrased thus or in the precise words used here, it cannot be collaterally raised now. An adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised. *Angel v. Bullington*, 330 U. S. 183, 186 (1947).

There are two separate appeals here, one from the denial of preliminary injunction of January 5, 1970, and one from the final judgment of March 30, 1970. Our motion to dismiss is directed to each. We respectfully submit that each should be dismissed.

Dated, May 12, 1970.

Respectfully submitted,

MOSES LASKY
ROBERT S. DAGGETT

By MOSES LASKY

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[illegible]